STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY EUGENE DAULTON,

Defendant-Appellant.

UNPUBLISHED
January 19, 2006

No. 257443
Lenawee Circuit Court
LC Nos. 04-010932-FH; 04-010933-FH; 04-010934-FH; 04-010935-FH; 04-010936-FH; 04-010937-FH; 04-010938-FH; 04-010939-FH; 04-010940-FH; 04-010941-FH; 04-010942-FH; 04-010943-FH; 04-010944-FH; 04-010945-FH; 04-010946-FH; 04-010947-FH

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of 16 counts of installing an eavesdropping device, MCL 750.539d.[1] Defendant was sentenced to concurrent terms of five years' probation, with the first 11 months to be served in the county jail, for his convictions. We affirm in part, but vacate the order for restitution in LC No. 04-010941-FH.

This case arises out of allegations that defendant videotaped customers at his nail and tanning salon, "Rock-N-Nails," in Adrian, Michigan. On appeal, defendant first argues that his 16 convictions for installing an eavesdropping device violated his double jeopardy protections against multiple punishments for the same offense and violated the Legislature's intent regarding the appropriate "unit of prosecution" under MCL 750.539d. We disagree. We review

[1] Defendant was originally charged with 16 counts of installing an eavesdropping device (Counts I), MCL 750.539d, and 16 counts of divulging unlawfully obtained information (Counts II), MCL 750.539e. The trial court granted defendant's motion for a directed verdict on each file in Counts II.

defendant's double jeopardy claim de novo both because it presents a question of law and because it requires this Court to construe the criminal statute at issue to determine if the Legislature intended multiple punishments. *People v Ford*, 262 Mich App 443, 446; 687 NW2d 119 (2004), citing *People v Calloway*, 469 Mich 448, 450-451; 671 NW2d 733 (2003).

In *Ford*, *supra* at 447-448, 450, this Court recently stated the following regarding double jeopardy and multiple punishments for one offense:

> Both the United States and Michigan Constitutions prohibit a person from twice being placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. The Double Jeopardy Clause of the United States Constitution, Am V, provides: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The Clause applies to the states through the Fourteenth Amendment. The Michigan Constitution provides: "No person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15. This provision is "essentially identical" to its federal counterpart, and was intended to be "construed consistently with the corresponding federal provision."
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> Both federal and Michigan double jeopardy provisions afford three related protections: 1) against a second prosecution for the same offense after acquittal; 2) against a second prosecution for the same offense after conviction; and 3) against multiple punishments for the same offense. The first two protections against successive prosecutions "involve the core values of the Double Jeopardy Clause, the common-law concepts of autrefois acquit and convict." The purposes of double jeopardy protections against successive prosecutions for the same offense are to preserve the finality of judgments in criminal prosecutions and to protect the defendant from prosecutorial overreaching. But the purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant from having more punishment imposed than the Legislature intended. "The Double Jeopardy Clause acts as a restraint on the prosecutor and the courts, not the Legislature." Accordingly, the Double Jeopardy Clause does not limit the Legislature's ability to define criminal offenses and establish punishments, and the "only interest of the defendant is in not having more punishment imposed than that intended by the Legislature[.]"
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> [U]nder both the federal and Michigan Double Jeopardy Clauses the test is the same: "in the context of multiple punishment at a single trial, the issue whether two convictions involve the same offense for purposes of the protection against multiple punishment is solely one of legislative intent." [Citations, footnotes, and emphasis omitted.]

Accordingly, the dispositive issue is whether the Legislature intended that multiple convictions might result under MCL 750.539d "under the circumstances presented in this case." *People v Wakeford*, 418 Mich 95, 111; 341 NW2d 68 (1983). In *Wakeford*, *supra* at 111-112, our Supreme Court indicated that the "primary purpose of the [armed robbery] statute is the protection of persons," thus, the unit of prosecution is the person assaulted or robbed. In contrast

to *Wakeford*, our Supreme Court in *People v Davis*, 468 Mich 77, 82; 658 NW2d 800 (2003), held that the carjacking statute focuses on the taking of a motor vehicle, and thus, that the unit of prosecution is the stolen vehicle. We reject defendant's claim that the eavesdropping statute in the instant case is more similar to the carjacking statute in *Davis* than the armed robbery statute in *Wakeford*.

MCL 750.539d provides:

> Any person who installs in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, or eavesdropping upon the sound or events in such a place or uses any such unauthorized installation, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than $2,000, or both.

The statute patently evidences the legislative intent to protect a "person or persons entitled to privacy" in any private place. MCL 750.539d.[2] See *Navarra v Bache Halsey Stuart Shields Inc*, 510 F Supp 831, 835 (ED Mich, 1981) (the intent of the Legislature in enacting the eavesdropping statute was to protect an individual's right to privacy). Similar to the armed robbery statute in *Wakeford, supra*, the purpose of the eavesdropping statute is the protection of a person's privacy and the appropriate unit of prosecution is the person whose privacy right in his or her private space is affected by the unauthorized installation of an eavesdropping device. As such, we conclude that the Legislature intended for multiple convictions under MCL 750.759d when the proofs at trial support that defendant violated the statute by videotaping multiple victims in the tanning room on separate occasions over a long period of time. *Wakeford, supra* at 111-112. We thus find no merit to defendant's claim that his 16 convictions under MCL 750.759d violate his right not to have more punishment imposed than the Legislature intended. *Ford*, *supra* at 448.

Defendant next argues that the trial court erred when it ordered defendant to pay Melissa Marie Cook $1,500 in restitution. We agree. Defendant failed to object to the restitution amount at sentencing, and thus, our review of this unpreserved issue is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Cook was defendant's apprentice nail technician; she intended to take a state board test at the end of her six month apprenticeship to become a licensed nail technician. Cook requested $1,500 in restitution because she lost all her "schooling" to pass the state board test. Therefore, Cook's request for restitution was based on her loss of "schooling" or "schooling money" to pass the state board test for licensing as a result of defendant's arrest and the closing of his salon.

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[2] The goal of statutory construction is to ascertain and facilitate legislative intent. *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1994). The first criterion in determining intent is the specific language of the statute. *House Speaker v State Administrative Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993).

Restitution is afforded both by statute and by the Michigan Constitution. Const 1963, art 1, § 24; *People v Grant*, 455 Mich 221, 229; 565 NW2d 389 (1997). The purpose of restitution is to "allow crime victims to recoup losses suffered as a result of criminal conduct." *Grant, supra* at 230. The Crime Victim's Rights Act, MCL 780.751 *et seq*., determines whether a sentencing court's restitution order is appropriate. *People v Crigler*, 244 Mich App 420, 423; 625 NW2d 424 (2001). "Victim" is statutorily defined as an "individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime." MCL 780.766(1).

Because Cook was not harmed as a direct result of defendant's criminal conduct, she was not a "victim" for purposes of restitution. MCL 780.766(1); *Grant, supra* at 230. Therefore, we hold that Cook is ineligible to recover her alleged loss from defendant and we vacate the order. Because we decide to vacate the restitution order, there is no need to address defendant's alternative claim of ineffective assistance of counsel.

Finally, in his Standard 4 brief, defendant contends that the trial court erred in denying his motion to quash evidence because his employee, Jennifer McNett, worked as a police agent and violated defendant's Fourth Amendment right by searching his salon without a warrant. Defendant further contends that the additional evidence found at his residence during the execution of the search warrant issued on the basis of the evidence found during the initial unlawful search at his salon should have been suppressed as the fruit of the poisonous tree. We disagree. We review de novo a trial court's determination on a motion to suppress evidence, but we review the underlying findings of fact for clear error. *People v Powell*, 235 Mich App 557, 560; 599 NW2d 499 (1999); *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997). A finding is clearly erroneous if it leaves the appellate court with a definite and firm conviction that the trial court made a mistake. *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998).

The Fourth Amendment of the United States Constitution and the parallel provision of the Michigan Constitution guarantee the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. However, Fourth Amendment search and seizure protections are not triggered where a search and seizure has been conducted by a private person. *People v McKendrick*, 188 Mich App 128, 141; 468 NW2d 903 (1991). In *McKendrick*, this Court explained:

> To determine whether a given search is the type proscribed by the Fourth Amendment, two initial factors must be shown. First, the police must have instigated, encouraged, or participated in the search. Second, the individual must have engaged in the search with the intent of assisting the police in their investigative efforts. A person will not be deemed a police agent merely because there was some antecedent contact between that person and the police, and there is no seizure within the meaning of the Fourth Amendment when an object discovered in a private search is voluntarily turned over to the government. [*Id.* at 142-143 (citations omitted).]

The record supports the trial court's finding that no evidence was presented to show that McNett was an agent of the police. Before February 27, 2004, McNett twice contacted the Adrian Police Department to report her suspicion regarding defendant's behavior, but the police

investigation of defendant did not start until February 27, 2004, when McNett called the Adrian Police Department to inform them that she located the video camera hidden inside the tanning room at defendant's salon. Nothing in the record shows that the police "instigated, encouraged, or participated" in McNett's search of defendant's salon prior to February 27, 2004. *Id.* at 142. The record also indicates that McNett acted without state assistance when she discovered the video camera on February 27, 2004. Mere antecedent contact with the police does not turn a private searcher into an agent of the police. *Id.* at 143. Thus, we find that McNett was not an agent of the police and her search of defendant's salon did not trigger Fourth Amendment protections. *Id.* at 141-143. As a result, the search warrant for defendant's residence issued on the basis of evidence initially obtained by McNett at defendant's salon was valid and the evidence obtained pursuant to the warrant should not be suppressed as the fruit of the poisonous tree. See *People v Stevens (After Remand)*, 460 Mich 626, 634; 597 NW2d 53 (1999). As such, we hold that the trial court did not err in denying defendant's motion to quash evidence.

Defendant additionally claims that his counsel was ineffective at trial in erroneously arguing that McNett had contacted Detective Lynn Keith Courington when, in fact, she had contacted Detective Grayer. We disagree. Because defendant did not move for a new trial or a *Ginther*[3] hearing, our review is limited to the mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy which this Court will not review with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999). Here, defendant has failed to overcome the presumption that counsel's decision to ask Detective Courington about his previous contact with McNett was sound trial strategy to support his theory that McNett was working as a police agent. The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Also, regardless of whom McNett contacted, there was no reasonable probability of a different outcome from McNett's mere antecedent contact with the police, and thus, there was no prejudice. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). As such, we find no merit in defendant's ineffective assistance of counsel claim.

We therefore affirm defendant's convictions and sentences, but vacate the order for restitution in LC No. 04-010941-FH. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Alton T. Davis

[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).